

ORIGINAL

(S E R V E D)
(DECEMBER 6, 1995)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1787(F)

STAUFFER CHEMICAL EUROPE S.A.,
SUBSIDIARY OF ZENECA SPECIALTIES
(FORMERLY ICI AMERICAS, INC.)

v.

NYK LINE

Administrative law judge erred in finding that tariff items were ambiguous merely because a dictionary listed a secondary use for a commodity, where there is no evidence presented as to the purpose for which the commodity was actually manufactured, sold or used.

Complainant shipper found not to have met its burden of proving that the commodity shipped had as its controlling or primary use that for which a lower tariff rate applied. Respondent carrier therefore found not to have overcharged shipper.

David L. Weiser for Complainant.
Paul M. Keane for Respondent.

REPORT AND ORDER

BY THE COMMISSION: (William D. Hathaway, *Chairman*; Harold J. Creel, Ming C. Hsu, Joe Scroggins, Jr., and Delmond J.H. Won, *Commissioners*)

This proceeding is before the Commission on Exceptions filed by Respondent NYK Line to the Initial Decision ("I.D.") of Administrative Law Judge Charles E. Morgan ("ALJ"). The ALJ found that Respondent had overcharged the Complainant shipper, Stauffer Chemical Europe S.A., Subsidiary of Zeneca Specialties (formerly ICI Americas, Inc.), and awarded reparations with interest. At issue was whether a shipment described on the bill of lading as Phenyl Mercaptan, Organic Chemicals, Aliphatic and/or Aromatic Compounds, was properly rated by Respondent as Aliphatic Compounds

and Aromatic Compounds, or should have been afforded the lower rate for Herbicides, Fungicides and Insecticides, as argued by Complainant. Peripheral issues were whether David Weiser, the FMC registered practitioner representing Complainant, was authorized to bring the complaint on behalf of a subsidiary company.¹

INITIAL DECISION

The Initial Decision disposed of the challenge to Mr. Weiser's authority to file the complaint, noting that the record includes a certification from Delaware's Secretary of State reflecting ICI Americas' name change to Zeneca, and Mr. Weiser's sworn statement that he is an agent for Stauffer, which is a subsidiary of Zeneca.

On the merits, the ALJ noted Respondent's position that none of the shipping documents gave any indication that Complainant intended to use the shipment as larvicide. He also noted the carrier's argument that regardless of the ultimate use of a commodity, the material question for rating purposes is the intrinsic nature of the commodity, not the Complainant's particular use for it. Upon referring to the described uses of the commodity in the Condensed Chemical Dictionary, 8th ed. (1971), the ALJ noted:

The chemical dictionary of record shows a definition of Thiophenol as another name for Phenyl Mercaptan, with the "Use: Chemical intermediate; mosquito larvicide." The other dictionary definition showed Thiophenol (phenyl

¹ The proceeding was initiated as an informal docket under Subpart S, 46 CFR 502.301 of the Commission's rules and assigned to Settlement Officer Joann Hillman, but the informal procedure was refused by NYK Line and the matter became a formal docket under Subpart T, 46 CFR 502.311, and was assigned to ALJ Morgan.

mercaptan) with the "Uses: Pharmaceutical syntheses."
[sic -- synthesis]

I.D., 3-4.

The ALJ concluded from this: "So apparently we have two dictionary definitions of phenyl mercaptan with different uses." I.D., 4. He accordingly applied the principle that as there were two equally applicable tariff descriptions, the shipper is entitled to the lower rate. He therefore found that Complainant was entitled to the rate for Herbicides, Fungicides and Insecticides, and awarded reparations.

POSITIONS OF THE PARTIES ON EXCEPTIONS

In its Exceptions, Respondent presses its standing arguments, i.e., that Mr. Weiser was authorized by Zeneca, not by Stauffer, to file the complaint, and that Zeneca failed to establish any proof of loss or assignment of claim from Stauffer.

Respondent also disputes the ALJ's finding that phenyl mercaptan's possible use as a larvicide justified its being rated as Herbicides, Fungicides and Insecticides. One use of a product does not necessarily determine the transportation nature for tariff purposes of a commodity, it argues, and Complainant failed to offer any evidence that its product was manufactured, sold or even used as a larvicide.

In its Reply, Complainant does not address the merits of the Exceptions, but only argues that because Respondent's Exceptions "did not request a review by the Commission," and the 30-day period for the Commission to review the decision on its own had expired, "the decision of the Administrative Law Judge should now be final."

DISCUSSION

Complainant's argument that the Commission should not review the Initial Decision because the Exceptions did not request review defies logic. Implicit in the filing of any exceptions is a request for Commission review of a decision. Unfortunately, Mr. Weiser relied so heavily on this argument that he declined to address the merits of the Exceptions.

While the ALJ is correct that ambiguous tariff descriptions must be resolved against the carrier, here there is no such ambiguity. The threshold issue in deciding whether phenyl mercaptan should be rated as Aliphatic and Aromatic Compounds or as Herbicides, Fungicides and Insecticides, is what is the product's use. The use for which a product is manufactured and sold is a most important factor in deciding the proper tariff classification of the product. C.S.C. International, Inc. v. Lykes Bros. Steamship Co., Ltd., 20 F.M.C. 552, 560 (1978).

Where a product has multiple uses, it is the primary or "controlling use" which defines the product for rating purposes. The fact that an article may have other subordinate or secondary uses does not alter the nature of the product. Continental Can Co. v. U.S., 272 F.2d 312 (2nd Cir. 1959), cited in C.S.C. v. Lykes, supra, at 560. See also Hazel-Atlas Co. - Misclassification of Glass Tumblers, 5 F.M.B. 515 (1958). If the same product were assigned different rates according to the particular uses of the product employed by the shippers, the result would be rate discrimination. "There is no better entrenched rule in the making

of rates and ratings than the one that a commodity cannot lawfully be rated or classified according to the different uses to which it may be put." Food Machinery Corp. v. Alton & S.R., 269 I.C.C. 603, 606 (1948).

Here, the ALJ found, in the same dictionary, two definitions and uses for the same commodity under the commodity's two different names. In the Condensed Chemical Dictionary, the use for thiophenol was described as "pharmaceutical synthesis." The use for phenyl mercaptan was described as "chemical intermediate; mosquito larvicide." It would appear that the primary uses under each definition, "pharmaceutical synthesis" and "chemical intermediate", are essentially the same; only one of the definitions listed "larvicide" as a use, and it was only a secondary reference. A second chemical dictionary, apparently not consulted by the parties or the ALJ, the McGraw-Hill Dictionary of Chemistry (1984), defines phenyl mercaptan as thiophenol, and the definition of thiophenol states only that it is "used to make pharmaceuticals." This appears consistent with the primary uses listed in the Condensed Chemical Dictionary. No mention is made in the McGraw-Hill Dictionary of thiophenol serving as a larvicide.

Nor has Complainant adduced any evidence whatsoever to establish that the product was manufactured or used as a larvicide. It bases its claim solely on the single, secondary dictionary reference relied upon by the ALJ. As the apparent manufacturer of the product, Complainant was particularly well-equipped to produce sales literature or other documentation establishing its nature and

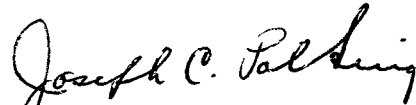
use, yet it failed to do so. The Commission often relies on such material to determine the identity of a product. See, e.g., European Trade Specialists v. Prudential-Grace Lines, Inc., 19 F.M.C. 148 (1976).

There is, therefore, virtually no support for the ALJ's finding that phenyl mercaptan is essentially a larvicide for which the lower tariffed rates for Herbicides, Fungicides and Insecticides would apply. On the contrary, the weight of the evidence strongly indicates that the commodity is primarily a chemical used for making other chemicals or pharmaceuticals, with its mosquito-killing function being a secondary use at best. The product was rated by Respondent as "Organic Chemicals Aliphatic and/or Aromatic Compounds," which nearly precisely corresponds with the bill of lading description of "Phenyl Mercaptan, Organic Chemicals, Aliphatic and/or Aromatic Compounds." The Commission concludes that the shipment was correctly rated by Respondent and that no overcharge occurred. It is therefore unnecessary to address whether Mr. Weiser had authority to bring this complaint on behalf of Zeneca's subsidiary company.²

² We would point out that the Commission has ruled that an overcharge case complainant, not merely its corporate affiliate, parent, or subsidiary, must produce evidence that it has either paid the freight or has validly succeeded to the claim. Bristol Meyers Company v. United States Lines, Inc., 24 F.M.C. 508, 509 (1981); Trane Company v. South African Marine Corp. (N.Y.), 19 F.M.C. 375 (1976). The Commission generally takes a liberal view of burden of proof on such matters, however, to ensure that the remedial purposes of the statutes it administers are fully effected. Rohm & Haas Co. v. Italian Line, 24 F.M.C. 429, 433 (1981).

THEREFORE, IT IS ORDERED, That the Initial Decision is reversed; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.
By the Commission.


Joseph C. Polking
Secretary